

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA  
JUL 14 2002 11:55  
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ELOUISE PEPION COBELL, et al., )  
)  
**Plaintiffs,** )  
v. )  
)  
GALE NORTON, SECRETARY OF )  
THE INTERIOR )  
et al., )  
)  
**Defendants.** )  
\_\_\_\_\_ )

No. 1:96CV01285 RCL  
(Hon. Alan L. Balaran, Special Master)

**INTERIOR DEFENDANTS' MOTION AND MEMORANDUM  
REGARDING PROPOSAL TO**

- (1) RESTORE AND SEARCH RETAINED BACKUP TAPES CONTAINING E-MAIL;**
- (2) IMPLEMENT REAL-TIME CAPTURE OF E-MAIL TRAFFIC AND  
INCORPORATION OF E-MAIL INTO A SEARCHABLE ARCHIVE; AND**
- (3) REPLACE INDEFINITE RETENTION OF BACKUP TAPES CONTAINING  
E-MAIL WITH BACKUP OF SEARCHABLE E-MAIL ARCHIVE**

The United States, on behalf of the Interior Defendants, respectfully submits to the Special Master this consolidated motion and memorandum, with accompanying proposed order, regarding (1) restoration and search of retained backup tapes containing e-mail, (2) implementation of real-time capture of e-mail traffic and incorporation into a searchable archive; and (3) replacement of the indefinite retention of backup tapes containing e-mail with backup of the searchable e-mail archive (items 1-3 collectively, "E-Mail Proposal").

As described preliminarily in the February 20, 2002 letter to the Special Master and Counsel for the Plaintiffs and accompanying attachments, attached and incorporated by reference ("February 20 Letter"; see Exhibit 1), the Interior Defendants have been working to address discovery-related issues involving the search and potential production of e-mail from system backup tapes containing e-mail ("e-mail backup tapes"), as addressed in the Special Master's July

27, 2001 Opinion (entered July 30, 2001 and adopted by this Court on March 29, 2002) (“July 2001 Opinion”), and earlier related orders. The Interior Defendants have now developed the E-Mail Proposal and satisfied funding and legal requirements to a degree that permits the E-Mail Proposal to be presented formally for approval, rather than informally as was done in the February 20 Letter.<sup>1</sup>

Because the cost of the E-Mail Proposal is significant (just the restoration of e-mail from retained e-mail backup tapes will cost millions of dollars) and because the Interior Defendants’ implementation of the E-Mail Proposal is so closely tied to discovery-related issues in the current litigation, the Interior Defendants will await the Special Master’s approval of the E-Mail Proposal before entering into a final contract with ZANTAZ, Inc. and beginning to implement the E-Mail Proposal.

On August 8, 2002, Interior and ZANTAZ made a presentation regarding the E-Mail Proposal to the Special Master and to counsel for the Plaintiffs. See Exhibit 2 (transcript of August 8 presentation). At that presentation, the Interior Defendants and ZANTAZ agreed that the Special Master’s experts could contact ZANTAZ directly to discuss any ZANTAZ-related technical or security aspects of the E-Mail Proposal.

On August 8, 2002, counsel for the Interior Defendants consulted with counsel for the

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<sup>1</sup>The Interior Defendants recognize and acknowledge that, between their submission of the February 20 Letter and this Motion, the Plaintiffs filed a motion for an order to show cause why the Interior Defendants and other named individuals should not be held in contempt for the Office of the Solicitor’s failure to preserve e-mail backup tapes (“Contempt Allegation”). This Motion addresses a different set of issues – restoration and search of e-mail from existing e-mail backup tapes and capture of future e-mail traffic – than does the Contempt Allegation, which has been responded to separately. This Motion is intended to be without prejudice to any rights, liabilities, or defenses that may be asserted by any party or named individual in connection with the Contempt Allegation.

Plaintiffs regarding this Motion, as required by LCvR 7.1(m). Consistent with the August 8 presentation and the Special Master's request for a motion, counsel jointly agreed that this motion for approval of the E-Mail Proposal would be filed.

## **BACKGROUND**

### **Basis for E-Mail Proposal**

In connection with the Plaintiffs' Third Formal Request for Production of Documents and related proceedings, the July 2001 Opinion denied a motion for a protective order that would have made it unnecessary for the Interior Defendants to search e-mail backup tapes for potentially responsive e-mails from the Office of the Solicitor.

The Interior Defendants' backup systems were designed not for the search and retrieval of individual e-mails, but for the restoration of data in the event of a system failure. See, e.g., July 2001 Opinion at 4 (“[t]hese systems are backed-up . . . onto a variety of tape media which are utilized to recover lost data in the event a catastrophic disaster causes the computer system to crash” (citing November 20, 1998 Declaration of Glenn Schumaker at ¶¶ 3, 4)). Because the Interior Defendants' existing e-mail backup system is not designed to accomplish the tasks required by the Special Master's orders, the Interior Defendants investigated their options and consulted with potential contractors regarding methods for searching e-mail backup tapes for responsive materials. The Interior Defendants ultimately determined that the most cost-effective way to address the July 2001 Opinion and related orders and discovery issues would be to implement a completely new system for handling e-mail based on a searchable e-mail archive backed up, maintained, and administered off-site by a third-party contractor. The alternative was

a time-consuming, administratively burdensome, and expensive search of all retained e-mail backup tapes each time a discovery request from the Plaintiffs or a document request from the Special Master was received. See, e.g., July 2001 Opinion at 12 (noting Interior Defendants' calculations that one search of "206 tapes" for responsive e-mails "required over 700 hours of staff time, 350 hours of attorney review time, and cost more than \$32,000" (citing July 12, 2000 Declaration of Sabrina McCarthy at ¶¶ 3-6)); Exhibit 2 at 8:2-8.

Because the cost of restoring e-mail from existing backup tapes and incorporating that e-mail into a searchable e-mail archive depends on the number of e-mail backup tapes, the Department of the Interior ("Interior") tasked Ernst & Young with conducting a physical inventory of retained e-mail backup tapes for the purposes of developing a cost estimate. See, e.g., United States' Status Report to the Special Master ("Biweekly Report") of December 18, 2001 and its Attachment A; Biweekly Report of January 22, 2002 and its Attachment A. That physical inventory was conducted not only throughout the Office of the Solicitor (main and regional offices) but also throughout the other offices and bureaus statutorily identified as having trust responsibilities or otherwise believed by the Interior Defendants to have e-mail traffic relevant to Individual Indian Money accounts and the current litigation. See 25 U.S.C. § 4043(b)(1) ("Special Trustee shall oversee all reform efforts within the Bureau [of Indian Affairs], the Bureau of Land Management, and the Minerals Management Service relating to the trust responsibilities of the Secretary"), Exhibit 2 at 26:11-17. The identified Interior offices and bureaus are Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service, Bureau of Land Management, Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals;

and Office of the Assistant Secretary for Policy, Management and Budget (collectively, “Designated Offices”).<sup>2</sup>

The physical inventory indicated that the Designated Offices had a total of 7,088 e-mail backup tapes that were generated between May 1, 1999, and November 30, 2001. The costs used to estimate the restoration portion of the E-Mail Proposal include the costs not only for those e-mail backup tapes but also for the post-inventory e-mail backup tapes that are generated by the Designated Offices from December 1, 2001 until implementation of the real-time capture of e-mail traffic eliminates the need to continue indefinitely retaining e-mail backup tapes (see section III, below). Until the e-mail backup tapes are restored and reviewed, however, there is no way of knowing the volume of unique, non-duplicative e-mail that will be present on those tapes, much less the volume of unique, non-duplicative e-mail that, when searched according to agreed-upon terms, will relate to issues in this litigation.

The Interior Defendants determined that ZANTAZ – a company that works primarily with the financial services sector to provide investigation- and litigation-oriented e-mail archival solutions that comply with the rigorous e-mail retention, search, and verification requirements of the Securities and Exchange Commission standards, see Exhibit 1 at DEF0043318, 43329, 43337; Exhibit 2 at 5:16 – 7:8; Exhibit 3 (ZANTAZ handout from August 8 presentation) at 1, 3, 12 – was best positioned to provide the e-mail restoration, archive, and search capabilities sought

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<sup>2</sup>Given the substantial cost of implementing the E-Mail Proposal and the fact that the Designated Offices are those most directly involved with the issues relating to this litigation, the Interior Defendants determined that the remaining offices and bureaus (including Bureau of Reclamation, Fish and Wildlife Service, National Business Center, National Park Service, Office of Surface Mining, and United States Geological Survey) did not merit inclusion in the E-Mail Proposal. In addition, the Office of the Inspector General is not currently participating in the E-Mail Proposal.

by the Interior Defendants and to relieve the Interior Defendants of the burdens associated with retaining and searching an increasingly large number of e-mail backup tapes. ZANTAZ ran a small-scale pilot test in the Office of the Solicitor to verify that its archive was compatible with the Interior Defendants' various e-mail systems and also reviewed sample backup tapes in a number of different formats on a number of different media from the Designated Offices to ensure that their restoration process and real-time capture of e-mail traffic would be compatible with the Interior Defendants' e-mail systems. See, e.g., Biweekly Report of December 18, 2001; Exhibit 2 at 14:14-16; 34:4 – 36:23.

After completion of the inventory of e-mail backup tapes, the pilot test, and the review of sample e-mail backup tapes, the Interior Defendants and ZANTAZ developed a cost estimate for the E-Mail Proposal. Although the Interior Defendants had not been able to confirm the availability of the funding necessary to implement the E-Mail Proposal as of the February 20 Letter, that funding commitment is now in place in the form of Fiscal Year 2002 funds that will need to be obligated to a final contract as early as possible in September 2002.

The Interior Defendants are now in a position to finalize the E-Mail Proposal, but they will not sign a final contract or begin implementation until the Special Master confirms that the E-Mail Proposal i) addresses the July 2001 Opinion and related orders regarding the search and production of e-mails from retained e-mail backup tapes and from future e-mail traffic; and ii) relieves the Interior Defendants of the financial and administrative burden of indefinitely generating and retaining e-mail backup tapes as soon as ZANTAZ has implemented its real-time capture of e-mail traffic and its own backup procedures, as discussed in section III, below.

### Additional Considerations

Because the E-Mail Proposal will involve a government contract, several additional considerations could affect the timing and implementation of the E-Mail Proposal, even after the Special Master's approval.

1. Decision to Procure the Services from a Sole Source – ZANTAZ – Rather than Through Competitive Bidding

Given the specific technical requirements and the exigencies of this case, the Interior Defendants plan to enter into a contract with ZANTAZ as the sole source provider for all of the services described in the E-Mail Proposal rather than proceed with a competitive bidding process. The Interior Defendants have received the necessary internal clearances to proceed with a sole source procurement and do not expect substantive opposition to the procurement or to the use of ZANTAZ as the sole source provider, but any administrative or legal challenge could delay implementation of the E-Mail Proposal.

2. Privacy Act – 5 U.S.C. § 552a

The Interior Defendants' current backup systems are not designed to allow the search for and retrieval of individual e-mails, but only to restore systems in the event of catastrophic failure. The Interior Defendants determined that the ZANTAZ e-mail solution – permitting the search of individual e-mails by a number of terms and parameters, including individual names – could constitute a new system of records for purposes of the Privacy Act. See 5 U.S.C. § 552a(a)(5) (applying to "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual"). Because of the potential Privacy Act

implications, the Interior Defendants are required to provide public notice of the proposed system of records, allow for a comment period, and address any comments received before implementing the system described in the E-Mail Proposal. See 5 U.S.C. § 552a(e)(4), (11).

The notice and comment portion of the Privacy Act process normally requires 40 business days: 30 business days for the Privacy Act notice requirement, plus an additional 10 business days required by the Office of Management and Budget ("OMB") in connection with Circular A-130 (although OMB has the discretion to waive that additional 10-day period). The Interior Defendants published the required Privacy Act notice in the Federal Register on July 12, 2002, see Exhibit 4, and also requested that OMB waive the additional 10-day period. The notice-and-comment period will close on August 23, 2002 if OMB grants a waiver, and on September 9, 2002 otherwise.

Although Interior does not expect any opposition to implementation of a new Privacy Act system of records in the form of the ZANTAZ searchable e-mail archive, any comments received during the notice period will need to be addressed and any subsequent administrative or legal challenges based on those comments could delay implementation of the E-Mail Proposal. To date, the Interior Defendants have not received any comments relating to the Privacy Act notice.

### 3. Statement of Work

Interior has worked closely with ZANTAZ to develop a draft Statement of Work ("SOW"). See Exhibit 5 (Draft SOW dated August 8, 2002). Because of the cost and significant impact of undertaking the E-Mail Proposal, the draft SOW will not be finalized, a contract will not be executed, and funds will not be obligated until the Special Master approves the E-Mail Proposal. The final SOW and contract, as well as the final contract price, will need to reflect any



refinements or alterations that result from the Special Master's consideration of the E-Mail Proposal. To the extent that the scope of work or cost of the E-Mail Proposal is affected significantly by the process of obtaining final approval, that may impact the Interior Defendants' ability to fund and implement the E-Mail Proposal, because Interior cannot execute a contract for which committed funding is not yet available. See, e.g., 31 U.S.C. § 1341 (Anti-Deficiency Act).

### **THE E-MAIL PROPOSAL**

As discussed in the February 20 Letter, the E-Mail Proposal can be thought of as consisting of three steps. The first step – the physical inventory of e-mail backup tapes as necessary to estimate and allocate the approximate costs for the remaining steps – has been completed for the Designated Offices. The second step, discussed in section I, below, consists of restoring e-mail from those backup tapes, reducing multiple occurrences of an identical e-mail to a single unique e-mail (“de-duping”), uploading all unique e-mails to a searchable storage medium, and searching those unique e-mails using agreed-upon terms. The third step, discussed in section II, below, involves capturing all current and future e-mail traffic at the e-mail servers for each Designated Office and routing it to an off-site, searchable e-mail archive that will be backed up, maintained, and administered by ZANTAZ. Once this capture and archive have been verifiably implemented throughout the Designated Offices, the Interior Defendants would, as discussed in section III, below, be relieved of the burden of indefinitely retaining e-mail backup tapes and be allowed to return to the standard system backup and backup tape retention procedures.

## I. RESTORATION AND SEARCH OF E-MAIL FROM RETAINED BACKUP TAPES

ZANTAZ will restore, de-dupe, and search the e-mails contained on the e-mail backup tapes retained by the Designated Offices – those tapes already inventoried for the period between May 1, 1999 and November 30, 2001, as well as those e-mail backup tapes that have accumulated since December 1, 2001, and that will continue to accumulate until the real-time capture and archive of e-mail traffic has been verifiably implemented. See Exhibit 1 at DEF0043319-43321, 43326-29; Exhibit 2 at 8:9-19; Exhibit 3 at 2, 4, 5; Exhibit 5 at ¶ 3. Those unique e-mails will then be incorporated into an Interior Department e-mail archive that will be backed up, maintained, and administered by ZANTAZ on behalf of Interior. See Exhibit 1 at DEF0043323-25; Exhibit 3 at 2-4, 7, 11; Exhibit 5 at ¶¶ 3.2.6, 5.2.4, 5.2.5, 6.2, 6.5.

### A. Transportation and Handling of Backup Tapes

The restoration and capture of all e-mail that may exist on the backup tapes from the Designated Offices will take place at ZANTAZ's headquarters in Pleasanton, California. ZANTAZ will dedicate a separate lab within its data center for this purpose, and the separate lab will have a single-door entrance controlled by biometric access (palm reader). Only those employees who are authorized to work on the project and who have signed the necessary non-disclosure and Privacy Act agreements will have access to the lab and to the backup tapes. See Exhibit 5 at ¶¶ 3.1.1, 8, 9, 11. For additional information regarding ZANTAZ's security policies and procedures, see Exhibit 1 at DEF0043330-36, 43338–400; Exhibit 3 at 7-12.

Although ZANTAZ can work with either originals or copies of backup tapes, Exhibit 5 at ¶ 3.1.3, ZANTAZ reports that a majority of its customers provide it with original rather than copies of backup tapes containing e-mails to be incorporated into ZANTAZ's searchable archive.

Like ZANTAZ's commercial customers, the Interior Defendants have determined that it would be prohibitively expensive – and time consuming – to copy thousands of e-mail backup tapes and verify the integrity of each copy before providing it to ZANTAZ. As a result, the Designated Offices will provide original e-mail backup tapes to ZANTAZ for processing. ZANTAZ confirms that its commercial customers transport their original backup tapes to ZANTAZ for processing by using commercial carriers that allow shipments to be tracked dock to dock (for example, Federal Express or UPS). Given the sensitivities of e-mail-related issues in this case and the handling of potential IIM-related information, the Interior Defendants are currently trying to determine whether an alternative such as a direct courier or personal delivery from each location of the Designated Offices to ZANTAZ would be economically and practically feasible and – equally important – more reliable than shipment with an established and experienced commercial carrier.

ZANTAZ and Interior will use a chain-of-custody procedure in which each tape to be sent to ZANTAZ from a particular office will be inventoried prior to packing and transport and will be confirmed by ZANTAZ immediately upon receipt. See Exhibit 1 at DEF0043320; Exhibit 5 at ¶ 3.1.1. Interior will package its backup tapes for transportation as recommended by ZANTAZ and standard industry practice, generate a signed certification by the designated person that identifies each backup tape included in each package being transported, and provide a copy of the certification and shipping inventory to ZANTAZ, together with information about the method of transport. Upon receipt of a shipment of backup tapes, ZANTAZ will notify the originating office of receipt, inventory and verify the shipment, and notify the originating office of any exceptions. The backup tapes will be placed into fireproof safes, except when ZANTAZ

personnel are working directly with a particular backup tape. See Exhibit 2 at 19:7-11; Exhibit 5 at 3.1.1.

ZANTAZ will only accept and process between 500 and 1,000 backup tapes at a time to allow close control of tapes and to ensure that all tapes can be properly secured and stored. Once a batch of backup tapes from a particular office or bureau have been processed and all e-mail has been captured from those backup tapes, ZANTAZ will return those backup tapes – complete with a status report, index, and certification that all e-mails contained on those tapes were incorporated into a searchable archive – via commercial carrier or as otherwise instructed by Interior, to the originating office and to the authorized person assigned to handle the returned backup tapes. See Exhibit 5 at ¶¶ 3.1.4, 3.2.3, 3.2.4, 3.2.11, 3.3.3, 3.3.4, 3.3.7. ZANTAZ will coordinate with the Interior Defendants to operate on a Just In Time basis, so that backup tapes will be returned to the originating office after they have been processed, and additional tapes will be made available for ZANTAZ to process on a rolling basis. See id. at ¶¶ 3.1.3, 3.2.11.

#### B. Restoration of E-Mail from Backup Tapes

ZANTAZ has previously reviewed the backup systems used by the Designated Offices and has confirmed that it will be able to use an automated, verifiable search of each backup tape to identify and capture a copy of each e-mail contained on that tape. Exhibit 2 at 34:4 – 36:23. No e-mail files will be removed or deleted from the original backup tapes. ZANTAZ's regular progress reports to the Interior Defendants will include a listing of all e-mail backup tapes that cannot be restored and searched using industry standard restoration and recovery techniques because of a problem with the media or with the programming. See id. at 35:11-23; Exhibit 5 at ¶ 3.3.5. The progress reports will include the identifying information for the particular tape(s),

the efforts made to recover the contents, the nature of the problem (if known), and whether any other non-destructive or destructive methods of accessing the e-mail on the backup tape(s) exist. See Exhibit 2 at 35:11-23; Exhibit 5 at ¶¶ 3.1.4, 3.2.3, 3.2.4, 3.2.4.1, 3.3.5. The Interior Defendants will, in consultation with the Special Master, determine how to handle any backup tapes that cannot be restored and searched by ZANTAZ.

Once all e-mails have been isolated and captured from a particular backup tape, ZANTAZ will de-dupe the e-mails and incorporate all unique (i.e., non-duplicate) e-mails into a searchable archive. See Exhibit 5 at ¶¶ 3.1.2, 3.2.5, 3.2.6. Once all e-mail from all backup tapes for a particular Designated Office has been restored, the archive will be searched for e-mails responsive to specified search terms. See id. at ¶¶ 3.1.1, 3.2.5, 5.2.3, 6.2. Both the automated search process and the results can be certified by ZANTAZ. See Exhibit 1 at DEF0043319; Exhibit 5 at ¶¶ 3.2.6, 3.2.7, 3.2.9. The Interior Defendants propose that the parties, together with the Special Master, develop an agreed-upon list of search terms to be used for the e-mails restored from e-mail backup tapes, and that the search be performed progressively as soon as e-mail restoration has been completed for a particular Designated Office (rather than waiting much longer until e-mail restoration has been completed for all Designated Offices).

#### C. Priority of Restoration

ZANTAZ plans to operate two shifts to complete the restoration process as quickly as possible, but it nevertheless expects that it will take from eight to nine months to complete its capture and search of e-mail from the e-mail backup tapes generated by all of the Designated Offices. The Interior Defendants propose that the restoration and archive of e-mail from backup tapes be completed for all locations of one Designated Office before beginning the process for

another Designated Office. The Interior Defendants also propose that the order of processing be prioritized according to which Designated Offices are most likely to have relevant e-mail traffic and which Designated Offices have previously been the focus of production requests. Thus, the Interior Defendants propose that ZANTAZ begin by restoring e-mail from backup tapes for the Office of the Solicitor, then continue in the following order: Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service, Bureau of Land Management, Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals; and Office of the Assistant Secretary for Policy, Management and Budget.

## II. IMPLEMENTATION OF REAL-TIME CAPTURE OF E-MAIL TRAFFIC AND INCORPORATION OF UNIQUE E-MAILS INTO A SEARCHABLE ARCHIVE

ZANTAZ provides a system for capturing all internal and external incoming and outgoing e-mail traffic at each e-mail server and automatically routing it – via a protected pathway – to an off-site, secure, searchable e-mail archive that is backed up, administered, and maintained by ZANTAZ. Exhibit 1 at DEF0043323-25; Exhibit 3 at 3, 5, 12; Exhibit 5 at ¶¶ 4-5. The Interior Defendants currently plan to use protected lines to route all e-mail traffic for the Designated Offices from Interior to ZANTAZ. The capture, routing, and archive of e-mails is invisible to e-mail users and does not require e-mail senders or recipients to take any special steps after the system is in place at the server. See Exhibit 1 at DEF0043324; Exhibit 2 at 17:10 – 18:11; Exhibit 3 at 4; Exhibit 5 at ¶ 5.1.2. Systems administrators for the Designated Offices do not need to do anything more than continue to monitor server activity using the procedures currently

in place.

The ZANTAZ system captures all internal and external e-mail traffic at the mail servers for the Designated Offices and archives not only an exact copy of each unique e-mail and its attachment(s) but also all headers and routing information. See Exhibit 1 at DEF0043321-24, 43326-29; Exhibit 2 at 15:12 – 16:4, 27:21 – 29:17; Exhibit 3 at 5, 6; Exhibit 5 at ¶¶ 5.1.2, 5.2.1. For example, an e-mail sent by one user to 50 recipients, including 10 “cc:” and 5 “bcc:” recipients would be archived as a single e-mail with all “to:”, “cc:”, and “bcc:” information intact, not as 50 copies of the same e-mail. If a user subsequently forwards that e-mail – with or without additional comments – that new e-mail will likewise be captured in the archive as a unique e-mail. Once a particular e-mail has been captured and routed to ZANTAZ, all identifying information is captured and encoded, a unique digital signature is added to disclose any later alteration or degradation, and the data are stored in two secure systems located in separate geographic areas. See Exhibit 1 at DEF0043324; Exhibit 2 at 6:18 – 7:3, 10:12-13; Exhibit 3 at 2, 4; Exhibit 5 at ¶¶ 5.2.1, 5.2.2, 5.2.4. Once the e-mails have been incorporated into the archive, ZANTAZ is responsible for backing them up according to the retention instructions issued by Interior. Exhibit 1 at DEF0043324-25, 43329; Exhibit 3 at 11; Exhibit 5 at ¶¶ 5.2.4, 5.2.5.

Although ZANTAZ will be responsible for backing up, maintaining, and administering the e-mail archive on behalf of Interior, the e-mails themselves will remain the property of Interior. Exhibit 5 at ¶¶ 5.2.5, 6.5. Furthermore, should the contract with ZANTAZ be terminated, all archived e-mails will be returned in a format and media selected by Interior. Id.

Once archived, the e-mails can be searched based on a number of parameters (including

names, dates, and specific words or phrases appearing in the body of the e-mail) and retrieved and provided to the Interior Defendants in the as-sent form. See Exhibit 1 at DEF0043326-28; Exhibit 3 at 3, 12; Exhibit 5 at ¶ 5.2.3. Again, the search process and the results can be certified by ZANTAZ. Exhibit 1 at DEF0043319. The Interior Defendants propose that, for future searches of captured e-mail traffic, the parties, together with the Special Master, develop an agreed-upon list of terms before starting each search.

To control costs, the Interior Defendants will, in consultation with the Special Master, determine a reasonable period for restored and captured e-mail to remain "live," i.e., on-line and readily searchable. See Exhibit 2 at 44:1-17; Exhibit 5 at ¶ 6.3. After that time, the e-mails will be loaded by ZANTAZ onto DLT tapes (which can be restored to a searchable archive and searched for an additional cost) and maintained by ZANTAZ in a secure storage facility. See Exhibit 2 at 44:19 – 45:9, 46:9-12; Exhibit 5 at ¶¶ 6.3, 6.5.

ZANTAZ can begin to implement the real-time capture of e-mail in the Designated Offices while the process of restoring and capturing e-mail from the backup tapes for the Designated Offices is underway. Implementation of e-mail capture and archive in a particular location will involve only minimal disruption and will allow the real-time capture of e-mail traffic to begin almost immediately. See Exhibit 1 at DEF0043329; Exhibit 2 at 17:3 – 18:11. ZANTAZ expects that implementation of the real-time capture and archive of e-mail in all locations of all of the Designated Offices could be completed in four to six weeks, barring any carrier-associated delays.

Implementing the real-time e-mail capture and archive while restoration is underway will also allow the Interior Defendants to verify that e-mail traffic within the Designated Offices is



certifiably being captured in and retained by the ZANTAZ archive, and will, as discussed in section III, below, allow the Interior Defendants to be relieved of the cost and administrative burden of indefinitely retaining e-mail backup tapes and to return to their normal system backup and tape retention procedures.

### III. REPLACEMENT OF INDEFINITE RETENTION OF E-MAIL BACKUP TAPES WITH ZANTAZ BACKUP, MAINTENANCE, AND ADMINISTRATION OF THE SEARCHABLE E-MAIL ARCHIVE

Because of the overall cost of the E-Mail Proposal and the burden associated with continuing to generate and indefinitely retain e-mail backup tapes, the Interior Defendants need confirmation that their verified implementation of the real-time capture and archive of e-mail traffic in the Designated Offices, together with ZANTAZ's undertaking to backup, maintain, and administer that archive of all unique e-mail traffic for the Designated Offices, see Exhibit 5 at ¶¶ 5.2.4, 5.2.5, 6.5, will relieve the Interior Defendants of the burdens of continuing to indefinitely retain e-mail backup tapes, see Exhibit 2 at 42:2 – 43:8. The e-mail archive implemented and managed by ZANTAZ will not only serve the same function as the Interior Defendants' indefinite retention of e-mail backup tapes but also provide the significant additional benefit of making those e-mails searchable, a capability that the Interior Defendants do not currently have with their retained e-mail backup tapes.

Interior's ability to fund the E-Mail Proposal depends in large part on its ability to relieve its offices and bureaus of the cost and administrative burden of departing from standard system backup and retention procedures and indefinitely retaining backup tapes containing e-mail.

Accordingly, the Interior Defendants move for an order relieving them of the burden of

indefinitely retaining e-mail backup tapes and allowing them to return to standard system backup and tape retention procedures according to the following process:

- (1) The Interior Defendants will provide the Special Master with two documents to confirm that e-mail capture has been implemented:
  - (a) a letter from Interior declaring that it identified to ZANTAZ all mail servers providing e-mail to a particular Designated Office, and
  - (b) a letter from ZANTAZ confirming that the real-time capture and archive of e-mail traffic has been implemented for all identified mail servers providing e-mail to a particular Designated Office and has operated for two weeks in accordance with ZANTAZ's standards for monitoring and documenting e-mail capture;
- (2) The Special Master will have two weeks from receipt of that letter from the Interior Defendants to verify or otherwise follow-up with the Interior Defendants and/or ZANTAZ regarding operation of the real-time capture and archive of e-mail traffic for that particular Designated Office;
- (3) Upon the earlier of the Special Master's approval or passage of the two-week period without any response from the Special Master, unless extended by order of the Special Master for a particular Designated Office, that office will be released from any further obligation to indefinitely retain e-mail backup tapes and may return to its standard system backup and tape retention procedures; and
- (4) Compliance with these procedures will relieve Interior from indefinitely retaining e-mail backup tapes, and Interior will have no further e-mail backup and retention obligations relating to this case – apart from those performed by ZANTAZ – unless and until the contract with ZANTAZ is terminated or ZANTAZ otherwise notifies Interior that it is unable or unwilling to perform e-mail backup and retention on behalf of Interior.

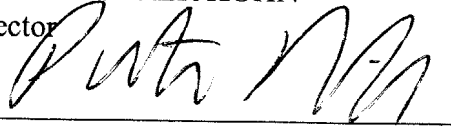
## CONCLUSION

For all of the reasons stated above, the Interior Defendants request approval of the E-Mail Proposal. Two supporting declarations and a proposed order accompany this Motion.

Dated: August 14, 2002

Respectfully submitted,

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Deputy Assistant Attorney General  
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 14, 2002 I served the foregoing *Interior Defendants' Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-mail; (2) Implement Real-time Capture of E-mail Traffic and Incorporation into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-mail with Backup of Searchable E-mail Archive* by facsimile upon:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, D.C. 20036-2976  
(202) 822-0068

Dennis M Gingold, Esq.  
Mark Kester Brown, Esq.  
1275 Pennsylvania Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20004  
(202) 318-2372

and by U.S. Mail upon:

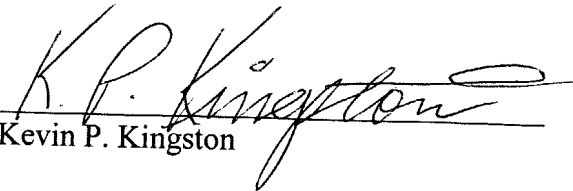
Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

Copy of the Motion, without attachments, served by facsimile on August 14, 2002;  
a complete copy to be delivered by hand the morning of August 15, 2002 upon:

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Avenue, N.W.  
12th Floor  
Washington, D.C. 20006  
(202) 986-8477

Courtesy Copy by U.S. Mail upon:

Joseph S. Kieffer, III  
Court Monitor  
420 - 7<sup>th</sup> Street, N.W.  
Apartment 705  
Washington, D.C. 20004

  
Kevin P. Kingston

ELOUISE PEPION COBELL, et al.,  
 Plaintiffs,  
 v.  
 GALE A. NORTON, Secretary of the Interior, et al.,  
 Defendants.

## ORDER REGARDING INTERIOR DEFENDANTS' E-MAIL PROPOSAL

ORDERED that the E-Mail Proposal is APPROVED for implementation by the Department of the Interior and ZANTAZ, and it is further

ORDERED that the following offices and bureaus within the Department of the Interior shall be "Designated Offices" for purposes of implementing the E-Mail Proposal: Office of the Solicitor; Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service, Bureau of Land Management, Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals;

and Office of the Assistant Secretary for Policy, Management and Budget; and it is further

ORDERED that the Interior Defendants shall keep the Special Master informed regarding implementation of the E-Mail Proposal, including, but not limited to, i) issues that delay or otherwise adversely affect implementation of the E-Mail Proposal; ii) notification of the date on which the Department of the Interior enters into a final contract with ZANTAZ for services related to the E-Mail Proposal; iii) status of the restoration, archive, and search of retained backup tapes for the Designated Offices; and iv) status of implementation of real-time capture of e-mail traffic within the Designated Offices and incorporation of that e-mail traffic into the searchable e-mail archive backed up, maintained, and administered by ZANTAZ; and it is further

ORDERED that the Interior Defendants shall coordinate with the Special Master and with counsel for the Plaintiffs to determine the search terms to be used to search for e-mail that has been restored to the archive from the retained backup tapes for the Designated Offices; and it is further

ORDERED that implementation of the real-time capture and archive of e-mail traffic, when certified by the Department of the Interior and ZANTAZ and confirmed by the Special Master, will relieve the Department of the Interior of any obligation to indefinitely retain backup tapes containing e-mail traffic and will allow the Department of the Interior to follow its normal system backup and tape retention procedures as long as the real-time capture and archive of e-mail traffic remains in effect.

August \_\_\_\_, 2002

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Special Master Alan Balaran

Copies to:

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